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No. 03-1566

Supreme Court, U.S.
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In The Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents,

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

Intervenors-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF INTERVENORS-RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *et al.*

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QUESTION PRESENTED

Whether the United States has waived its sovereign immunity to a suit, brought by several landowners within the Westlands Water District, to enforce the alleged requirements of a 1963 contract between the District and the United States.

CORPORATE DISCLOSURE STATEMENT

The intervenors-respondents are the Natural Resources Defense Council, United Anglers of California, Save San Francisco Bay Association, California Waterfowl Association, Sierra Club, The Bay Institute of San Francisco, Environmental Defense Fund, California Striped Bass Association, Trout Unlimited of California, Sacramento River Council, California Sportfishing Protection Alliance, Pacific Coast Federation of Fishermen's Associations, and The Wilderness Society. None of the intervenors-respondents has any parent corporation or publicly held company owning ten percent or more of its stock.

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STATEMENT

This case involves a dispute over water deliveries from the Central Valley Project ("CVP"), a federal reclamation project, to the Westlands Water District (the "District"), a California local agency, under the District's long-term water service contract with the United States. In 1993, the United States delivered to the District less than the maximum quantity of water allowed under the District's contract. Pet. App. 3a. Petitioners, who are several landowners within the District, seek to sue the United States for breach of the District's contract. Pet. 4-5,13. The district court ruled on summary judgment that the United States had not waived its sovereign immunity to this claim. Pet. App. at 26a-45a. The government's sovereign immunity defense turns on the threshold question whether petitioners are "contracting entit[ies]" with respect to the District's contract, 43 U.S.C. § 390uu; *see also* Pet. App. 8a, 9a, and the district court concluded that petitioners are neither parties to, nor intended third-party beneficiaries of, that contract. Pet. App. at 26a-45a. The Ninth Circuit affirmed in relevant part. Pet. App. at 17a.

The split alleged by petitioners between the Federal and Ninth Circuits is illusory. The Ninth and Federal Circuits apply the same legal standard in determining whether third parties are intended beneficiaries under a governmental contract. Thus, what petitioners seek is fact-bound correction of the Ninth Circuit's allegedly erroneous application of legal principles upon which the circuit courts agree. The case upon which petitioners rely in alleging a split with the Federal Circuit is factually distinguishable from this case, and presents no inter-circuit conflict.

However, even if it were possible to construe a split with the Federal Circuit, that split would be extremely shallow, making review by this Court premature. Moreover, the question presented is not a matter of national importance, and this case – the ultimate merits of which would not likely be affected by a ruling in favor of petitioners on the question presented in the petition – offers a poor vehicle for deciding the issue. In addition, the third-party beneficiary standard applied by the Ninth and Federal Circuits is correct. For all of these reasons, the Court should deny the petition for a writ of certiorari.

1. Congress enacted the Reclamation Act of 1902 to address twin dilemmas: western settlers' "enormous demand . . . for irrigation systems" and the western states' "lack[] [of] means" to finance the dams, reservoirs, and canals needed to meet this demand. *Peterson v. United States Dep't of Interior*, 899 F.2d 799, 802 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990). Congress originally gave to the Department of the Interior the tasks of not only constructing and operating these massive water storage systems, but also of distributing project water to irrigators. *Id.* at 804. In 1926, however, Congress effectively ended the Secretary's role in water distribution, providing that "[n]o water shall be delivered upon the completion of any new project . . . until a contract or contracts . . . shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts. . . ." 43 U.S.C. § 423e; *see also Peterson*, 899 F.2d at 804; 43 U.S.C. § 485(d) & (e).

The Central Valley Project, in California, is a water storage and conveyance project authorized pursuant to these federal reclamation laws. *See O'Neill v. United States*, 50 F.3d 677, 680 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993). The United States delivers CVP water to irrigation and municipal water agencies under long-term water supply contracts, most of which were originally executed during the 1940s through the 1960s. *See, e.g., Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1123 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999); *O'Neill*, 50 F.3d at 680. The Westlands Water District receives CVP water pursuant to a contract the District executed with the United States in 1963. *See Firebaugh Canal*, 10 F.3d at 669.

Several provisions of this 1963 contract are relevant. Article 11(a) limits the District's rights when, due to shortage from "any . . . causes," the United States fails to deliver the maximum quantity of water authorized under the District's contract. *See O'Neill*, 50 F.3d at 682-83 & n.2. That Article provides, in pertinent part:

> There may occur times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States . . . for any damage . . . arising from a shortage on account of errors in operation, drought, or any other causes.

Westlands Water Dist. v. United States, 337 F.3d 1092, 1097 (9th Cir. 2003) (omission in original). Article 11(b) further specifies what remedies may be available to the District, or to anyone claiming "by, through, or under the District," due to a water shortage:

> In the event that in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article . . . less than the quantity of water which

> the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year. . . . To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

Pet. App. 13a.

Two other provisions of the 1963 contract establish that the United States' financial relationship is with the District, and that the District is obligated to pay the United States for water service regardless of any nonpayment by the District's customers. Article 14 provides, in relevant part:

> The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District.

Pet. App. 31a. Finally, Article 15 provides, in relevant part:

> Should any assessment or assessments required by the terms of this contract and levied by the District against any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void . . . then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant thereto shall be furnished for the benefit of such lands or water users, except upon the

> payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District . . . shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

Pet. App. 11a-12a.

2. By the 1980s, after more than a half-century of massive federal and state water diversions, the Central Valley's natural environment was under considerable stress and a number of its indigenous species were on the brink of extinction. *See, e.g.*, *NRDC v. Houston*, 146 F.3d at 1124; *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1129-34 (E.D. Cal. 1992). Among these species were the Sacramento River winter-run Chinook salmon, which in 1990 the National Marine Fisheries Service listed under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* as threatened with extinction, and

the Delta smelt, which in 1993 the U.S. Fish and Wildlife Service listed as threatened with extinction. *See O'Neill*, 50 F.3d at 681; *see also* 50 C.F.R. §§ 17.11, 224.101(a).[1] Subsequently, the National Marine Fisheries Service and Fish and Wildlife Service concluded that certain operations of CVP facilities could jeopardize the continued survival of these species. Pet. App. 3a; *O'Neill*, 50 F.3d at 681.

Around the same time, Congress enacted the Central Valley Project Improvement Act of 1992 ("CVPIA"), Pub. L. No. 102-575, 106 Stat. 4706 *et seq.* (1992). Express purposes of this Act were to "protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley"; to "address impacts of the Central Valley Project on fish, wildlife and associated habitats"; and to restore "balance" among agricultural, urban and environmental water demands on the CVP. CVPIA § 3402(a), (b) & (f), 106 Stat. 4706. The CVPIA amended the CVP's authorizing legislation to make the protection and restoration of fish and wildlife explicit Project purposes, co-equal with storage and delivery of water for irrigation, *see* CVPIA § 3406(a), 106 Stat. 4714, *amending* Act of Aug. 2, 1937, 50 Stat. 850, and directed the Secretary of the Interior, "immediately upon enactment of this title," to operate the Central Valley Project "to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act," and to "dedicate and manage annually eight hundred thousand acre-feet of Central

[1] In 1994, the National Marine Fisheries Service changed the listing status of the Sacramento River winter-run Chinook salmon from "threatened" to "endangered." *See* 59 Fed. Reg. 440 (1994).

Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title . . . ." CVPIA § 3406(b) & (b)(2), 106 Stat. 4714-15.

As a result of Congress' enactment of the CVPIA, and of the listing of the winter-run Chinook salmon and Delta smelt under the Endangered Species Act, the Bureau of Reclamation in 1993 delivered to the District less than the maximum quantity of water authorized by the District's 1963 water service contract. Pet. App. 3a. Several lawsuits ensued. *See id.*; *O'Neill*, 50 F.3d at 680-82.

3. In March 1993, a group of plaintiffs, including petitioners, filed a motion to enforce a stipulated judgment that had in 1986 been entered in *Barcellos & Wolfsen, Inc. v. Westlands Water District*, No. CV 79-106-EDP (E.D. Cal. 1986). Pet. App. 3a-4a, 16a. These plaintiffs, who are individual landowners within the District, contended that the United States' reduction of water deliveries in 1993 breached the United States' contractual obligations to the District and therefore also violated the *Barcellos & Wolfsen* stipulated judgment, which they alleged had compelled compliance with that contract. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 720-21 (E.D. Cal. 1993). The district court rejected this claim on the merits, and the Ninth Circuit affirmed. *O'Neill*, 50 F.3d at 689. The court of appeals reasoned that "Article 11(a) [of the District's contract] unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *Id.* at 689. This Court denied the landowners' petition for a writ of certiorari. *See* 516 U.S. 1028 (1995).

Meanwhile, the District in 1993 filed its own lawsuit – the instant case – and petitioners intervened. *O'Neill*, 50 F.3d at 689 n.7; Pet. 13. The District's complaint sought injunctive relief against the Secretary of the Interior under, *inter alia*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, 4332. *See Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 459, 461 (9th Cir. 1994). After the district court granted a preliminary injunction in favor of the District, the Ninth Circuit, on interlocutory appeal, vacated the injunction. *Id.* at 460-62. The District then voluntarily dismissed its complaint. Pet. App. 4a.

Following the District's voluntary dismissal, petitioners sought to continue to prosecute the present case in their own names. *Id.* Whereas the District had sought injunctive relief under various statutory theories, petitioners now seek damages from the United States for its alleged 1993 breach of contract. Pet. i, 14.[2] The alleged breach includes the same reduction in water deliveries over which petitioners sued, unsuccessfully, in *O'Neill*. Pet. 13; Pet. App. 3a.

The district court, per Judge Oliver W. Wanger, ultimately held that, because petitioners were neither signatories to nor "intended third-party beneficiaries" of the District's contract, the United States had not waived its sovereign immunity as to their contractual breach claim. Pet. App. 31a-34a, 45a. The only relevant waiver of

[2] Petitioners originally pursued a number of additional statutory, constitutional, and other non-contractual legal theories, *see* Pet. App. 21a-22a, but they have abandoned those theories in their petition.

sovereign immunity, located at 43 U.S.C. § 390uu, provides in relevant part:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty. . . .

In essence, the district court concluded that petitioners are not "contracting entities" as to whom the section 390uu waiver of sovereign immunity applies. Pet. App. 27a-34a.

The Ninth Circuit affirmed, in a decision authored by Judge Clifton and joined by Judges Noonan and Thomas. The court explained that before third parties (such as petitioners) may sue to enforce a contract (and thus, in this case, defeat the United States' claim of sovereign immunity), they must first show that they are "'the intended beneficiary of the contract.'" Pet. App. 10a (citation omitted).

In distinguishing between "intended" third-party beneficiaries (who may sue to enforce a contract) and "incidental" beneficiaries (who may not), the court turned to its earlier holding in *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir.), *cert. denied*, 531 U.S. 812 (2000). Pet. App. 10a. There, the court had held that certain irrigators in the Klamath Basin were not "intended" third-party beneficiaries of a contract between the United States and PacifiCorp involving operation of a federal dam. *Id.* at 1209. In reaching that conclusion, *Klamath Water Users* had, in turn, employed the Federal Circuit's own

recently articulated third-party beneficiary standard. *See id.* at 1211-12 (citing *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)).

Specifically, the Federal Circuit had, fourteen years after *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984), ruled in *Montana v. United States* that a third party may to sue to enforce a governmental contract only where certain conditions exist:

> [T]he contract must 'reflect[] the express or implied intention of the parties to benefit the third-party.' The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class *clearly intended* to be benefited thereby. One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him.

124 F.3d at 1273 (emphasis added; footnote and citation omitted; second alteration in original).

It was this test that the Ninth Circuit, in *Klamath Water Users*, adopted almost verbatim:

> To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party. The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class *clearly intended* by the parties to benefit from the contract. One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her.

204 F.3d at 1211 (emphasis added; internal citations and footnote omitted).

And it was this *Montana / Klamath Water Users* "clear intent" standard that the Ninth Circuit applied to the instant case. Pet. App. 10a. Writing for a unanimous panel, Judge Clifton acknowledged that Articles 11(b) and 15 of the District's contract with the United States mentioned third-party water users, but reasoned that the mere mention of third parties alone is not sufficient to find a clear intention by the parties to contract for those third parties' direct benefit. Pet. App. 11a. Article 15 of the District's contract, the court reasoned, simply established requirements for separate contracts that the District would enter into with its customers. Pet. App. 12a-13a. As for Article 11(b)'s reference to persons claiming "by, through, or under the District," this language could only "sensibly" refer to individuals to whom the District has contractually assigned its rights and duties under the contract. Pet. App. 13a-14a. Thus, the court could find no clear intention in the District's contract to make petitioners or other District landowners "intended," as opposed to "incidental," beneficiaries of the contract. Pet. App. 12a-14a.

DISCUSSION

The petition for a writ of certiorari presents no question meriting this Court's review. The split alleged by petitioners is illusory, for the Ninth Circuit here applied the Federal Circuit's own legal standard for determining whether third parties are intended beneficiaries under a governmental contract. What petitioners seek is fact-bound error correction of the Ninth Circuit's application of

settled contract law principles upon which the courts of appeals agree. The case upon which petitioners rely in alleging a split with the Federal Circuit is factually distinguishable from this case, and therefore presents no conflict.

Even if it were possible to construe a split, however, that split would be extremely shallow, making review by this Court premature. The paucity of cases addressing the issue raised by the petition indicates that the question presented is not a matter of pressing national importance. This case also presents a poor vehicle through which to address this issue, as a prior judgment bars the relief petitioners seek and resolution of the question presented in favor of petitioners is thus unlikely to affect the ultimate outcome of this case. In any event, the third-party beneficiary standard applied by the Ninth and Federal Circuits is correct. For all of these reasons, the Court should deny the petition for a writ of certiorari.

1. *The ci. uit split alleged by petitioners is illusory.*

(a) Although petitioners profess to find a conflict between the intended third-party beneficiary standards applied by the Ninth Circuit and the Federal Circuit, no such conflict exists. The Ninth Circuit here examined the language of the District's contract to ascertain whether that contract evinced a "clear intent" to benefit petitioners directly. Pet. App. 10a. This "clear intent" standard was originally announced by the Federal Circuit itself, and has been followed by that court at least since *Montana v. United States*, 124 F.3d 1269 (Fed. Cir. 1997). *See, e.g.*, *Caguas Cent. Fed. Sav. Bank v. United States*, 215 F.3d 1304, 1309 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001). Far from conflicting with the Federal Circuit, the

Ninth Circuit's decision followed its sister circuit's lead. Because the Ninth and Federal Circuits apply the same third-party beneficiary standard, petitioners' alleged split is illusory. What petitioners actually seek is fact-bound review of the Ninth Circuit's allegedly erroneous application of settled contract principles on which the courts of appeals agree. This Court does not normally sit to review a single circuit's application of a properly stated rule of law. *See* Supreme Court Rule 10.

(b) Nor does the decision below conflict with the Federal Circuit's pre-*Montana* decision in *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984), in which the Federal Circuit ruled that certain individual irrigator plaintiffs could sue as intended third-party beneficiaries to enforce "alleged implied contracts" and a consent decree between a Washington State irrigation district and the United States. The only express basis for *H.F. Allen Orchards*' finding of intended third-party beneficiary status renders that case factually distinguishable from the decision below. Specifically, *H.F. Allen Orchards* rested on the "undisputed" premise that the irrigator plaintiffs there had "a property right" in the water to which the agreements applied. 749 F.2d at 1576. The grounds on which that premise rested do not exist here.[3] Unlike in *H.F. Allen Orchards*, the United States

[3] This property interest arose from the particular circumstances of the Yakima Project. As noted in *Ickes v. Fox*, 300 U.S. 82, 89, 90, 94 (1937), the Yakima Project's water rights were originally obtained by the individual farmers themselves, not by the United States, and the United States had initially contracted with those farmers directly, only establishing a contractual relationship with an irrigation district many years later. *See also* Pet. 16.

acquired its CVP water appropriation permits directly and holds the associated property interests in its own name. *See, e.g.*, *County of San Joaquin v. State Water Res. Control Bd.*, 54 Cal. App. 4th 1144, 1156 n.12 (Cal. Ct. App. 1997), *cert. denied*, 522 U.S. 1048 (1998); California State Water Res. Control Bd., Revised Decision 1641, 1999 WL 1678482, at *83 (Mar. 29, 2000); *see also United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 145 (Cal. Ct. App. 1986) ("The trial court rejected the first argument on the basis that the federal contractors have no water rights of their own but are subject to the limitations of the permits held by the CVP."). Also unlike in *H.F. Allen Orchards*, the United States contracted with the District from the outset, not first with petitioners. And here, unlike in *H.F. Allen Orchards*, the California State Water Resources Control Board, the state's water rights agency, has specifically held, as a matter of California law, that the United States, not the District or its irrigators, owns the water rights at issue. *See* Revised Decision 1641, 1999 WL 1678482, at *83-*84 (citing *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 34 (1929); *Erwin v. Gage Canal Co.*, 226 Cal. App. 2d 189, 192 (Cal. Ct. App. 1964)).[4]

[4] Under section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, questions regarding the appropriative water rights of the Bureau of Reclamation are governed by state law "in all respects not directly inconsistent with [congressional] directives." *California v. United States*, 438 U.S. 645, 678 (1978); *cf. United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 853-54 (9th Cir. 1983) (Kennedy, J.) (holding that section 8 incorporates the "special rule[s]" of each state). The California Supreme Court has specifically disavowed the notion, advanced by petitioners, that the Bureau holds its CVP water rights merely as a trustee for the irrigators or other ultimate users of CVP

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Because this case is factually distinguishable from *H.F. Allen Orchards*, the Ninth Circuit's decision creates no conflict with the Federal Circuit. On the contrary, the Ninth Circuit applied the same third-party beneficiary standard as announced by the Federal Circuit in *Montana*.[5]

2. *The court of appeals' decision does not present an issue of exceptional or nationwide importance.* As we have explained, the Ninth and Federal Circuits presently apply the same "clear intent" standard when analyzing whether a particular governmental contract may be enforced by members of the public that benefit from that contract. To the extent petitioners merely argue that the Ninth Circuit

water. *See Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal. 2d 692 (1960) ("*Ivanhoe II*") (disavowing *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597 (1957) ("*Ivanhoe I*"), *reversed sub nom. Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958)).

[5] Because the Ninth Circuit adopted the same legal standard as the Federal Circuit announced in *Montana*, the Ninth Circuit's decision could only conflict with *H.F. Allen Orchards* if *H.F. Allen Orchards* also creates an *intra*-circuit split with *Montana*. To the extent there is any ambiguity in *H.F. Allen Orchards*, it would be appropriate to construe that ambiguity to avoid an intra-circuit split, thereby also eliminating any split between the two circuits. In any event, to the extent there is any doubt whether *H.F. Allen Orchards* conflicts with the decision below (and *Montana*), the circuit split would be extremely shallow and review by this Court premature. Review by this Court may also be unnecessary, as the question of the third-party beneficiary status of Klamath Basin farmers is presently being briefed in the Court of Federal Claims, and that case may provide the Federal Circuit with a timely opportunity to consider any tension in its own case law. *See Klamath Irrigation Dist. v. United States*, Civ. No. 01-591 DGS (Fed. Cl.). Rather than assuming that a present conflict between the two circuits exists, it would be more appropriate for this Court to await further clarification by the Federal Circuit itself.

misapplied that shared standard to the facts of this case, that court's alleged fact-bound mistake would not warrant issuance of a writ of certiorari. *See* Supreme Court Rule 10.

Nor does petitioners' professed need to be able to enforce the District's contract with the United States, over the District's objection, present an issue of exceptional or nationwide importance. Experience teaches that irrigation districts generally represent their landowners' interests quite aggressively. Indeed, although petitioners' own irrigation district dismissed its complaint in this case, it did so only after losing on interlocutory appeal. More generally, the District has shown no reticence in litigating on petitioners' behalf. *See, e.g.*, *Westlands Water Dist. v. United States Dep't of the Interior*, __ F.3d __, 2004 WL 1558290 (9th Cir. July 13, 2004); *Westlands Water Dist. v. United States*, 337 F.3d 1092 (9th Cir. 2003); *Westlands Water Dist. v. United States*, 100 F.3d 94 (9th Cir. 1996); *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013 (11th Cir. 1992); *Westlands Water Dist. v. Amoco Chem. Co.*, 953 F.2d 1109 (9th Cir. 1991); *Westlands Water Dist. v. United States*, 700 F.2d 561 (9th Cir. 1983); *Westlands Water Dist. Distribution Dist. No. 1 v. Natural Resources Defense Council*, 276 F. Supp. 2d 1046 (E.D. Cal. 2003); *Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F. Supp. 2d 1224 (E.D. Cal. 2003); *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111 (E.D. Cal. 2001). The District has, on the contrary, represented petitioners' interests forcefully, through frequent forays to the courthouse.

Because the United States has waived sovereign immunity to breach-of-contract claims by contracting districts, *see* 43 U.S.C. § 390uu, the question of whether and in what circumstances individual landowners within such districts may sue independently has arisen only infrequently. Indeed, although Congress enacted the Reclamation Act more than a century ago, *see* Act of June 17, 1902, 32 Stat. 388, and although Congress directed the Secretary of the Interior more than three-quarters of a century ago to contract with water agencies rather than individual water users, *see* 43 U.S.C. § 423e, petitioners point to just three appellate decisions on the question of when individual water users may sue to enforce such a contract. Two of these decisions, *Klamath Water Users* and the decision below, arose in the Ninth Circuit. The other, *H.F. Allen Orchards*, arose in the Federal Circuit. The Fifth, Eighth, and Tenth Circuits – which also encompass portions of reclamation lands, *see* http://www.usbr.gov/main/about/ (visited July 19, 2004) – have apparently never considered the question at all. Pet. 19. Given this paucity of case law, the question presented here is neither so common nor so pressing that it requires this Court to consider the issue where the circuits have yet to disagree on any principle of law.

3. *This case presents a poor vehicle for this Court to review the third-party beneficiary standard.* Even assuming a waiver of sovereign immunity were found here, petitioners' claim would almost certainly be rejected on other grounds. This case therefore presents a poor vehicle for addressing the intended third-party beneficiary issue on which petitioners seek review.

Petitioners' present claim is quite narrow, involving water deliveries in one year, more than a decade ago,

under the District's contract with the United States. The ultimate merits question at issue – whether the United States violated a contractual obligation to petitioners in 1993 – was finally adjudicated against petitioners almost ten years ago in *O'Neill*, 50 F.3d at 689. That case held that the District's contract expressly absolves the United States of liability for reductions in delivery caused by any cause, including compliance with subsequently enacted statutes. *O'Neill* was correctly decided and is, in any event *res judicata* as to petitioners' claim that the United States in 1993 breached its contractual obligations. *See generally Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Thus, even if petitioners were to succeed in defeating the government's claim of sovereign immunity, they would be unlikely to obtain the ultimate relief they seek. This Court should await a vehicle in which the third-party beneficiary determination is likely to matter to the outcome of the case.

4. *The third-party beneficiary standard followed by the Ninth Circuit, and the Federal Circuit in* Montana, *is correct.* Finally, the Ninth Circuit was correct in its conclusion that members of the public who benefit from governmental service contracts should not be allowed to sue to enforce those contracts absent a clear intention by the contracting parties to confer such rights on the public. As explained in the Restatement (Second) of Contracts, "[g]overnment contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." Restatement (Second) of Contracts § 313 cmt. a (1981). The particular contract at issue here, between the United States and the District, evinces no clear intention to allow the District's many landowners each to pursue separate

suits to try to enforce their own theories regarding this contract.

The United States has signed literally hundreds of different water service contracts involving the Central Valley Project. These contracts involve both irrigation and municipal water service. Some of these contracts ultimately provide water to hundreds of thousands (and in the case of one large contractor, the Santa Clara Valley Water District, more than 1.5 million) individual California customers. *See, e.g.*, http://www.valleywater.org/About_Us/District_Info/FAQs.shtm (visited July 20, 2004); http://www.valleywater.org/Water/Where_Your_Water_Comes_From/index.shtm (visited July 20, 2004). If petitioners' third-party beneficiary theory were correct, then the United States would be subject to breach-of-contract suits, not just by petitioners, but by each of the innumerable members of the public who (although having no direct contractual relationship with the federal government whatsoever) ultimately put Central Valley Project water to beneficial uses ranging from agricultural irrigation to watering their lawns and brushing their teeth. Nothing in the text of 43 U.S.C. § 390uu or in precedent compels either such an unworkable result or such a sweeping waiver of sovereign immunity. *See generally Lane v. Pena*, 518 U.S. 187, 192 (1996) (holding that a waiver of the government's sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign."). The Ninth Circuit's application of the Federal Circuit's *Montana* standard to the facts of the District's contract was correct and does not call for an exercise of this Court's supervisory power.

CONCLUSION

The petition for a writ of certiorari should be denied.

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